

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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ZACKERY CRABTREE,

Petitioner,

v.

WILLIAM GITTERE, et al.,

Respondents.

Case No. 3:19-cv-00479-LRH-CLB

ORDER

This is an action for habeas relief under 28 U.S.C. § 2254 brought by Zackery Crabtree, a Nevada prisoner. Respondents have filed a motion to dismiss claims in Crabtree's amended petition for a writ of habeas corpus (ECF No. 33). ECF No. 65. As grounds for dismissal, respondents argue that Ground 1 and Ground 3 of the amended petition are procedurally defaulted. Also pending before the court is Crabtree's motion for appointment of counsel. ECF No. 62. For reasons that follow, the respondents' motion to dismiss is granted in part and denied in part, and Crabtree's motion for appointment of counsel is denied.

I. Procedural Background

Pursuant to a guilty plea agreement consolidating two criminal cases, Crabtree was convicted in the Fifth Judicial District Court for Nevada of invasion of the home and attempted battery by a prisoner. The court sentenced him to consecutive terms totaling 67 to 168 months and entered a judgment of conviction on September 27, 2016. Crabtree's attempts at a direct appeal were dismissed as untimely.

1 In June 2017, Crabtree filed a post-conviction petition for a writ of habeas corpus
2 in the state district court. Prior to the state district court ruling upon his post-conviction
3 petition, Crabtree filed motions to modify his sentence and to withdraw his guilty plea.

4 The state district court denied the motions a couple of weeks after they were filed
5 in December 2017. Then, in June 2018, the state district court denied Crabtree's post-
6 conviction petition. Crabtree appealed. In June 2019, the Nevada Supreme Court
7 entered an order affirming the lower court's judgment denying post-conviction relief.

8 In August 2019, Crabtree initiated this federal habeas corpus proceeding. In
9 January 2020, he filed an amended petition raising three grounds for relief. In response
10 to the petition, respondents filed a motion to dismiss arguing that all three grounds were
11 unexhausted. The court agreed with respect to Grounds 1 and 3 (but not Ground 2) and
12 gave Crabtree the option of either abandoning the unexhausted claims or requesting a
13 stay while he returned to state court to exhaust his unexhausted claims. He chose the
14 latter and respondents did not oppose.

15 Consequently, the court entered an order imposing a stay, and Crabtree filed a
16 second habeas petition in state court. The state district court entered an order
17 erroneously stating that the state court need not act on the petition because Crabtree
18 had a case pending in federal court. Crabtree petitioned the Nevada Supreme Court for
19 a writ of mandamus, which the court denied because Crabtree had neglected to attach
20 a copy of the petition for writ of habeas corpus that he had filed in the lower court.

21 In May 2022, this court granted Crabtree's request to reopen these proceedings.
22 The following week, he filed a motion for appointment of counsel. In August 2022,
23 respondents filed their motion to dismiss.

24 II. Motion to Dismiss

25 Respondents argue that Grounds 1 and 3 are procedurally defaulted because
26 Crabtree can no longer present the claims in compliance with Nevada's procedural
27 rules. Crabtree presented both grounds to the state district court in compliance with this
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1 court's order granting him a stay for that purpose. Rather than adjudicate the claims, the
2 state district court judge appears to have misunderstood the purpose of this court's stay
3 order and refused to act on Crabtree's petition. ECF No. 66-4.

4 As respondents note, Nevada has procedural rules that would serve as grounds
5 for dismissing Crabtree's habeas claims. Under Nevada law, a petitioner must
6 raise all available claims on direct appeal. *Franklin v. State*, 877 P.2d 1058, 1059 (Nev.
7 1994) *overruled on other grounds by Thomas v. State*, 979 P.2d 222 (Nev. 1999). In
8 addition, he has only one year from the time his direct appeal concludes to file a petition
9 for a writ of habeas corpus. Nev. Rev. Stat. § 34.726. And, a petitioner may only file one
10 state post-conviction petition, and must raise all available claims in that one petition; any
11 second or successive petition raising claims that should have been raised earlier is
12 barred by Nev. Rev. Stat. § 34.810.

13 Presumably, the state district court would have applied one or more of these
14 procedural bars had it properly adjudicated Crabtree's most recent petition. Also, any
15 further attempt to exhaust the claims would almost certainly have the same result.
16 Under such circumstances, the claims are considered technically exhausted, but
17 procedurally defaulted. *See Castille v. Peoples*, 489 U.S. 346, 351 (1989).¹ Where a
18 petitioner has procedurally defaulted his claims, federal review is barred unless he "can
19 demonstrate cause for the default and actual prejudice as a result of the alleged
20 violation of federal law, or demonstrate that failure to consider the claims will result in a
21 fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 735 n.1, 750
22 (1991).

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25 ¹ See also *Dickens v. Ryan*, 740 F.3d 1302, 1317 (9th Cir. 2014) (en banc) ("An unexhausted
26 claim will be procedurally defaulted, if state procedural rules would now bar the petitioner from
27 bringing the claim in state court."); *Sandgate v. Maass*, 314 F.3d 371, 376 (9th Cir. 2002) (federal
28 courts may consider a claim procedurally defaulted if "it is clear" such claim would be procedurally
barred by state courts).

1 Nevada's procedural bars can be excused by a showing of cause and prejudice
2 or actual innocence, which are substantially the same as the federal standards. As
3 respondents acknowledge, however, "the question whether a petitioner's procedural
4 default is excused by cause and prejudice for purposes of federal habeas review is a
5 federal, not state, question." *Visciotti v. Martel*, 862 F.3d 749, 768 n.10 (9th Cir. 2016).
6 Thus, this court will reserve judgment as to whether the procedural default of Grounds 1
7 and/or 3 should be excused. Crabtree may argue that point when he files his reply to
8 the respondents' answer.

9 III. Motion for Appointment of Counsel

10 Crabtree's motion of appointment of counsel (ECF Nos. 62) is one of several he
11 has filed in this proceeding. The motion is denied for reasons his previous motions for
12 appointment of counsel were denied. See ECF Nos. 31/49.

13 IV. Conclusion

14 IT IS THEREFORE ORDERED that respondents' motion to dismiss (ECF No. 65) is
15 GRANTED in part and DENIED in part. Grounds 1 and 3 are technically exhausted, but
16 procedurally defaulted because they would be procedurally barred by the state courts.

17 IT IS FURTHER ORDERED that a decision on whether Crabtree can
18 demonstrate the procedural default should be excused is DEFERRED until after the
19 parties have answered and replied.

20 IT IS FURTHER ORDERED that respondents have 60 days from the date this
21 order is entered to file and serve an answer to Crabtree's amended petition (ECF No.
22 33). In all other respects, the scheduling order entered on May 18, 2022, (ECF No. 60)
23 remains in effect.

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1 IT IS FURTHER ORDERED that Crabtree's motion for appointment of counsel
2 (ECF Nos. 62) is DENIED.

3 DATED THIS 28th day of Nov., 2022.

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6 UNITED STATES DISTRICT JUDGE
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